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**VIA ECF**

The Honorable Laura Taylor Swain  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *The New York Times Company et al. v. Department of Education,*  
No. 19-cv-693 (LTS) (JLC)

Dear Judge Swain:

I am counsel for plaintiffs The New York Times Company and its reporter Erica Green (jointly, “The Times”) in the above-captioned action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. We submit this letter in response to the Government’s November 30, 2021 Letter (Dkt. 34), informing the court of *NRDC v. EPA*, No. 20-422 (2d Cir. Nov. 29, 2021), and arguing that *NRDC* decides one of the issues in this case. The Times disagrees.

*NRDC* does not hold, as the government suggests, that talking points and briefing materials are categorically exempt from disclosure. The burden remains on the agency to prove that each document withheld pursuant to Exemption 5 is both predecisional and deliberative. *See* Dkt. 30, at 14–15 & n.4. As further explained in The Times’s motion papers, the DOE has failed to demonstrate that disclosure of the talking points and briefing materials at issue would reveal anything about internal deliberations over specific DOE policies. *Id.* at 13–16.

Respectfully submitted,

/s/ David McCraw

David McCraw

cc: All counsel of record (via ECF)